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# Supreme Court of the United States

OCTOBER TERM, 1948.

No. 442

442

HANNAH COHEN, Executrix of the Estate of Sol Cohen, deceased, and DAVID F. COHEN, Intervenor,

*Petitioners,*

*against*

BENEFICIAL INDUSTRIAL LOAN CORPORATION,

*Respondent,*

*and*

O. W. CASPERSON, JOHN BUDD SMITH, ROY E. TUCKER, EVERETT T. FELTER, JACKSON R. COLLINS, C. A. SMITH, E. L. KENCAID, ALBERT G. MORHART, RAYMOND D. SHEPPARD, ALFRED G. ZIMMERMAN, FRED C. EIBELL, RICHARD K. STEINMAN and PAUL A. SEIBOLD, Individually,

*Defendants.*

No. 512

512

BENEFICIAL INDUSTRIAL LOAN CORPORATION,

*Petitioner,*

*against*

Honorable WILLIAM F. SMITH, a Judge of the United States District Court for the District of New Jersey; and HANNAH COHEN, Executrix of the Estate of Sol Cohen, deceased, and DAVID F. COHEN, Intervenors,

*Respondents.*

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.*

## MOTION AND BRIEF OF LEWIS M. DABNEY, JR. AS *AMICUS CURIAE.*

LEWIS M. DABNEY, JR.,
*Amicus Curiae,*
61 Broadway,
New York 6, N. Y.

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## Motion for Leave to File Brief as *Amicus Curiae*.

*To The Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

The undersigned, as an attorney of this Court, respectfully moves this Honorable Court for leave to file the accompanying brief as *amicus curiae*.

Counsel for petitioners have consented to the filing of this brief. Counsel for respondents have been requested to consent, but have refused.

April 15, 1949.

LEWIS M. DABNEY, JR.,
*Amicus Curiae.*

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## BRIEF OF *AMICUS CURIAE.*

Questions of constitutionality and appealability aside, this case presents the simple issue of whether, in a diversity suit, a federal court sitting in New Jersey is bound to apply

Chapter 131 of the Laws of 1945.* This issue turns upon whether the right to security for expenses of litigation bestowed upon the corporate defendant by this statute is "substantive" or "procedural", as these terms are defined in *Guaranty Trust Company* v. *York*, 326 U. S. 99, 109, i. e., does the application of this statute substantially affect the result of the litigation?

In *Boyd* v. *Bell*, 64 F. Supp. 22 (S. D. N. Y.), Judge Bright pointed out the obvious fact that the granting or withholding of security does not affect the outcome of the main litigation brought by a plaintiff stockholder on behalf of the corporation against the individual wrongdoing defendants.** To meet this point—and also the point respecting the appealability of the order refusing security—

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* "In any action instituted or maintained in the right of any domestic or foreign corporation by the holder or holders of shares, or of voting trust certificates representing shares, of such corporation having a total par value or stated capital value of less than five per centum (5%) of the aggregate par value or stated capital value of all the outstanding shares of such corporation's stock of every class, exclusive of shares held in the corporation's treasury, unless the shares or voting trust certificates held by such holder or holders have a market value in excess of fifty thousand dollars ($50,000.00), the corporation in whose right such action is brought shall be entitled, at any stage of the proceeding before final judgment, to require the complainant or complainants to give security for the reasonable expenses, including counsel fees, which may be incurred by it in connection with such action and by the other parties defendant in connection therewith for which it may become subject pursuant to law, its certificate of incorporation, its by-laws or under equitable principles, to which the corporation shall have recourse in such amount as the court having jurisdiction shall determine upon the termination of such action. The amount of such security may thereafter, from time to time, be increased or decreased in the discretion of the court having jurisdiction of such action upon showing that the security provided has or may become inadequate or is excessive."

** In the latter stages of this same litigation, Judge Frank expressly and Judges Chase and Clark impliedly, agreed with Judge Bright's conclusion. *Aspinook Corp.* v. *Bright*, 165 F. 2d 294 (C. C. A. 2d).

respondent has contended, and the Court of Appeals has held, that the controversy regarding security is a cause of action separate from the main action.* This exercise of verbal logic does not, however, meet Judge Bright's objection. If we say that there are two litigations, the main litigation and the bond litigation, these litigations are nevertheless connected;** and the posting of security in the bond litigation still remains a procedural condition precedent to the continuance of the main litigation.*** So we are just where we started.

Accordingly, the respondent corporation if it adheres to the formula laid down in *Guaranty Trust Co.* v. *York*, is driven to the argument that an order requiring the posting of a bond "significantly affects" the main litigation in the sense that, unless the order is complied with, the main litigation ends. If this is what the court meant in *Guaranty Trust Co.* v. *York*, then any procedural device, however fantastic, which puts a quietus upon a lawsuit is, within the *York* definition, "substantive" and binding upon the

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* "Now it must be conceded in the case at bar that the right to security given to Beneficial by R. S. 14:3-15 is not a part of and is legally unconnected with the causes of action asserted by the plaintiff against the individual defendants for the benefit of the corporate defendants. It is as if a [fol. 53] little cause of action had been engrafted on the body of the main suit for the benefit of the corporation" (R. 50).

** "There can be no doubt, however, that the New Jersey statute imposes a limitation on the right of the plaintiff to maintain her suit. R. S. 14:3-15 is a kind of legal hybrid, functioning both by way of limitation and creation" (R. 50-51).

*** Even in the bond litigation, viewed as a separate litigation, the posting of a bond is probably procedual. The only escape from this conclusion is to argue, as does respondent, that no final judgment may be entered against plaintiff in excess of the amount of the bond. The statute is silent upon this point. In the absence of construction by a New Jersey court we submit that this court should hesitate to say that final relief is limited by the amount of the bond fixed in an early stage of the litigation on the basis of biased and conflicting affidavits.

federal courts. The more drastic the limitation on plaintiff's right to proceed, the more "substantive" it becomes—with the result that federal courts in diversity cases can govern their own procedure only in unimportant particulars. We respectfully submit that the *York* case stands for no such doctrine.

In the *York* case this Court specifically approved and retained the doctrine expounded in *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491; *Henrietta Mills* v. *Rutherford Co.*, 281 U. S. 121; and *Kelleam* v. *Maryland Casualty Co.*, 312 U. S. 377 (a decision rendered after the *Erie R. R.* v. *Tompkins*, 304 U. S. 641), that federal courts will enforce equitable rights newly created by a state but will not give equitable remedies unknown to their own system of jurisprudence. The adoption of the Federal Rules of Civil Procedure and the recent repeal of the Conformity Act have given congressional support to this policy. It is clear, therefore, that a field exists, denominated "procedural", where the state may validly legislate for its own courts but may not legislate for federal courts. The sole question is as to the content of that field. If respondent's contention be accepted, it has no significant content.

It is true that where a state may constitutionally deny any remedy for a pre-existing right in its own courts, the federal courts, sitting in diversity cases, are likewise closed. *Angel* v. *Bullington*, 330 U. S. 183. Accordingly, had New Jersey in terms abolished stockholder actions, it would have brought itself within the *Angel* doctrine; but such a statute would have raised constitutional problems even more serious than are here presented. By adopting a procedural device which denies a remedy in some but not all cases, it may have reduced the constitutional risk so far as its own courts are concerned; but by adopting that device it has incurred

a different risk, the risk that federal courts will characterize the device as procedural—which it is—and refuse to be bound by it.

The question here presented is not one of judicial as against legislative powers. It concerns the balance of power between the states and the distribution of power between the states and the nation. Within the state itself the legislature has great latitude in experimentation. Within broad limits the remedy of a citizen against ill-judged legislation lies at the polls and not in the courts. But this caveat has little force when the conflict arises not within the state but between different states or sections. When such a sectional clash of interests results in litigation, Congress has afforded an impartial tribunal for the litigants and has dictated the procedure in that tribunal. To rob the term "procedural" of all significant content is to thwart the very purpose of the diversity jurisdiction.

To be specific: It is a matter of common knowledge that the financing and direction of national corporations are concentrated in a few states, where management constitutes a powerful interest economically and politically. A citizen of New York* sells stock in a national corporation to a citizen of Texas and then proceeds to loot the corporation. The citizen of Texas resorts to a national court in the State of New York. He is there confronted with a procedural device, enacted not by Congress but by the New York Legislature, which, responding to the dominant local interest, seeks to make his action as difficult as possible. Upon protesting, he is solemnly told that this device, though procedural in the classic sense, is binding on the federal courts; that whether procedural or substantive, it represents an import-

* Section 61-b of the New York General Corporation Law is the prototype of similar legislation in New Jersey and Pennsylvania.

ant public policy of New York (Resp. Brief, p. 33); and that if he does not like it he can appeal to the New York Legislature (Resp. Brief, p. 42).

A short and, we believe, a proper answer, rooted in constitutional history, is that New York can clog the remedies of its own citizens in its own courts, but cannot regulate the traditional remedies given by federal courts to citizens of other states.

Respectfully submitted,

LEWIS M. DABNEY, JR.,
*Amicus Curiae.*